No. 83-5785

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERNANDO WILLIAMS,

Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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REASON FOR GRANTING WRIT

I. HERNANDO WILLIAMS' RIGHT TO A JURY DRAWN FROM A CROSS-SECTION OF THE COMMUNITY AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WAS VIOLATED BY THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES TO EXCLUDE RACIAL MINORITIES FROM THE JURY WHICH ULTIMATELY IMPOSED THE DEATH PENALTY ON MR. WILLIAMS. ALTERNATIVELY IN LIGHT OF THE ON-GOING HISTORY OF RACIALLY MOTIVATED USE BY PROSECUTORS IN COOK COUNTY OF PEREMPTORY CHALLENGES, AS RECOGNIZED BY AT LEAST ONE ILLINOIS SUPREME COURT JUSTICE AND ONE DIVISION OF THE STATE APPELLATE COURT, THIS CAUSE SHOULD BE REMANDED TO THE STATE TRIAL COURT FOR AN EVIDENTIARY HEARING IN LINE WITH THE HOLDING IN SWAIN V. ALABAMA, 380 U.S. 202 (1965).

A. HERNANDO WILLIAMS' RIGHT TO BE TRIED BY A JURY DRAWN FROM A CROSS-SECTION OF THE COMMUNITY WAS VIOLATED BY THE PROSECUTOR'S DELIBERATE EXCLUSION OF ALL BLACKS FROM THE PETIT JURY.

Initially the respondent argues that the holding in Swain v. Alabama, 380 U.S. 202 (1965) is "still the law". This is not in

dispute. The question this Court should examine is whether the holding in Swain truly comports with the sentiments set forth in the Sixth and Fourteenth Amendments to the United States Constitution. Five members of this Court have recognized the importance of the issue of the prosecution's racially motivated use of peremptory challenges. McCray v. New York, ___ U.S. ___, 103 S. Ct. 2438. (1983)

In the original petition filed in this cause it was argued that until this court removes the strait-jacket of the Swain holding the courts of this nation will be unable to undertake the experimentation called for by the Justices who concurred in the denial of certiorari in McCray. This argument is still valid, but petitioner recognizes that some courts are courageous enough to experiment.

In McCray v. Abrams, ___ F. Supp. ___, 34 CrL. 229 (December 19, 1983) the U.S. District Court Eastern District of New York, undertook the re-evaluation of Swain called for by the concurring Justices and granted petitioner's writ of habeas corpus where the record supported the allegation that the prosecutor had used peremptory challenges to exclude racial minorities.

It is still petitioner's belief that this issue will not be freely explored, but to the extent that other courts do accept the invitation to experiment, the courts of this nation will reach diverse decisions. Indeed, in the Eastern District of New York, the federal court will investigate a state prosecutor's racial motivated use of challenges, (McCray), but the state courts cannnot. See People v. McCray, 57 N.Y. 542, 443 N.E. 2d 915 (1982).

Petitioner is not arguing that all segments of society must be reflected on every petit jury. He is simply arguing that the Fourteenth and Sixth Amendments to the United States Constitution cannot be read in such a way as to allow the prosecutors of this nation, who presumably take an oath to abide by the Constitution, to exercise their biases in the selection of juries and thus deprive defendants of the right to be tried by a jury reflecting a cross-section of the community. A cross-section cannot truly reflect every ethnic or social category; but a cross-section from

which large, identifiable segments of the society are automatically and ritually excluded is, by definition, a biased universe. The respondent's argument that if petitioner's position is adopted will result in prolifigating litigation is based on the unstated presumption that prosecutors will continue to employ their prejudices in excusing jurors. If this is true, there will be litigation on the issue. Deservedly so. In individual cases the issues involved will not be complex and the trial judges of this nation will have no great difficulty in resolving them as they control all other aspects of a trial.

Beginning on p. 10 of its response, respondent attempts to justify the exclusion of individual black jurors. When the excluded jurors are compared with white jurors accepted by the state, the racial motivation becomes embarrassingly apparent.

Respondent postulates that Theresa Powell was excused because she was an administrator for the University of Illinois, and "(p)rosecutors tend to be suspicious of academic intellectuals." Res. p. 10. Yet the first juror accepted by the State and one that ultimately ended up on the jury was Florence Yaroch, a school teacher (H. 268) who had recently completed an art appreciation course at the Art Institute. (H. 313) Another juror whose academic intellectualism seems to have been blunted by the paleness of her skin, Cathy Ann Savicki, was acceptable to the State and actually sworn as a juror, but was discharged for medical reasons before the entire jury was sworn. (H. 906-908, 1380, 1570). Robert Lynch, another teacher, (H. 1110) was acceptable to the State despite his liesure activities of reading history, playing the guitar and writing plays. (H. 1114-1115)

Other blacks were excused, according to Respondent because they identified their religion as Baptist. (Res. p. 10-11) Aside from the fact that this rationale comes close to, in and of itself, constituting an admission that the prosecutors deliberately set out to deprive defendant of a jury comprising a cross-section of the community, by depriving practicing Baptists of the right to serve on the jury, it is interesting to compare this reasoning with the State's failure to inquire into the religious affiliation of William Winter. During the State's

examination of Mr. Winter, no inquiry was made as to his religion, and on defense examination he stated simply that he was a protestant. (H. 2999) When the panel which included Mr. Winter was tendered to the State, no effort was made to determine if he were in fact a Baptist. Indeed, Mr. Winter was not even recalled. (H. 2197-2221) Thus while the State seeks to rely on the religious affiliation of the black prospective juries, those same beliefs were not subject to inquiry if the prospective juror was white.

Respondent argues that individual blacks were excused because they were "nervous". (Res. p.11) Yet Ms. Savicki's original protestations that she was not a claim person (H. 798) did not render her unacceptable to the State. Fannie Mae Green, a black woman, was excused because, the State now argues, she did not want to serve. (Res. 11) Such protestations coming from Rose Ocwieza did not render this lady unacceptable to the State as an alternate. (H. 2859) Nor did Eva Hartrick's statement that she did not want to serve prohibit the State from accepting her as a juror. (H. 1099, 1158)

Lillian Wallace, black, was excused, the State now declares, because she had an adolescent son. (Res. 11) Yet other jurors acceptable to the State had male children in their teens or early twenties: Florence Yaroch, (H. 308); Richard Lucking (H. 1044, 1123); Louise Klein (H. 1056, 1132); Rose Ocwieza (H. 2855); Laureen Redina (H. 3132). (The last four being accepted as alternates.)

Respondent has come up with two imaginative reasons to justify the exclusion of Sheryl Williams. First that she was young and unmarried. (Res. 11-12) This reasons should have precluded the State's acceptance of Miss Savicki (H. 785) or Eva Hartrich. Ms. Williams, aside from being black, had the misfortune to be employed as a bank teller and thus unacceptable. Yet Shirley Young, accepted for the jury, also worked in a bank. (R. 2069)

This Court should not allow the prosecutors of this nation to enforce their racial bias through the use of peremptory challenges.

B. WHERE AT LEAST ONE JUSTICE OF THE ILLINOIS SUPREME COURT AND ONE DIVISION OF THE ILLINOIS APPELLATE COURT HAVE RECOGNIZED THE EXISTENCE OF "AN OPEN SECRET" THAT PROSECUTORS IN CHICAGO AND ELSEWHERE HAVE HISTORICALLY AND SYSMATICALLY USED PEREMPTORY CHALLENGES TO REMOVE ALL OR ALL BUT TOKEN BLACKS FROM JURIES IN CRIMINAL CASES WITH BLACK DEFENDANTS, PETITIONER WILLIAMS IS ENTITLED TO A HEARING ON THIS ISSUE UNDER THE GUIDELINES OF SWAIN V. ALABAMA, 380 U.S. 202 (1965)

The Respondent argues that Petitioner has not proven a historic and continuing systematic discrimination in the exclusion of blacks from petit juries in Illinois or Cook County. Respondent here confuses the difference between pleadings and facts. All that Petitioner is requesting under this section of the argument is the hearing which Swain held he is entitled to when a historic pattern or racial discrimination is alleged.

The facts provided by the Illinois Coalition Against the Death Penalty were recognized, if criticized, by the Illinois Supreme Court. Those facts, and the observation of sitting judges which amplify the issue, are sufficient under the Swain holding, to require a hearing. This court should it choose to continue the validity of Swain v. Alabama, establish guidelines for the hearing on the issue of historic, systematic discrimination.

II. HERNANDO WILLIAMS' SIXTH AMENDMENT RIGHT TO A JURY DRAWN FROM A CROSS-SECTION OF THE COMMUNITY WAS VIOLATED BY THE EXCLUSION OF JURORS WITH SCRUPLES AGAINST THE DEATH PENALTY. IN AFFIRMING THE SENTENCES OF DEATH IMPOSED UPON WILLIAMS THE ILLINOIS SUPREME COURT ERRED BY MISAPPLYING STATE EVIDENTIARY WAIVER RULES TO A SIXTH AMENDMENT ISSUE.

The respondent's argument here is based on over-ruled cases and argument that the record is incomplete. The Illinois Supreme Court did not note any incompleteness in the record. Finally, under the rules of appellate practice in Illinois, the "record on

appeal shall be taken as true and correct unless shown to be otherwise..."Ill. S. Ct. Rule 239. This rule also provides for the amendment of the record, by either party if any omissions are discovered. The respondent is attempting here to inject a totally false factual issue to discourage this Court from reviewing this case.

The Respondent also argues that since the State did not use all of its peremptory challenges, the exclusion of a scrupled juror, specifically Delores Hudson, must be harmless error. Having no law to support this position, the respondent invents it, citing two Illinois decisions that, according to the State, accepted this "argument".

Respondent fails to recognized that both cases were reversed by this Court, although Respondent does cite to the decision in one of the cases. In that citation, Respondent indicates the case was affirmed. That case, People v. Moore, 42 Ill. 2d 73 (1969) was reversed in light of Furman v. Georgia, 408 U.S. 238 (1972) see Moore v. Illinois, 408 U.S. 786 (1972). The Respondent citation of People v. Speck, 41 Ill. 2d 177 (1968) is interesting since that case was reversed in light of Witherspoon v. Illinois, 391 U.S. 510 (1968). See Speck v. Illinois, 403 U.S. 946 (1971); See also Bernette v. Illinois, 403 U.S. 497 (1971) for the same result despite the holding of the Illinois Supreme Court.

As the cases cited in the original petition establish, it is the prosecution's burden to establish the disqualification of a juror on Witherspoon grounds. Where the record rails to justify the exclusion the death senterce cannot stand. Davis v. Georgia, 492 U.S. 122 (1976).

III. THE ILLINOIS DEATH ACT BOTH ON ITS FACE AND AS APPLIED AGAINST HERENANDO WILLIAMS IS VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. THE ILLINOIS DEATH ACT, BY VESTING TOTAL DISCRETION IN THE PROSECUTORS AS TO WHOM SHALL BE SUBJECT TO THE DEATH PENALTY ENSURES THAT CAPITAL PUNISHMENT WILL BE INFLICTED IN A FREAKISH MANNER

IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner stands on his argument in his original petition.

B. THE ILLINOIS DEATH ACT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENT IN THAT IT PROVIDES NO DEFINED LIMITS ON THE FACTORS WHICH MAY BE CONSIDERED BY THE SENTENCING AUTHORITY, NOR DOES IT ALLOCATE A BURDEN OF PROOF AS TO THE ULTIMATE ISSUE.

Petitioner stands on the argument under this heading advanced in his Petition.

C. THE ILLINOIS DEATH SENTENCING SCHEME FAILS TO PROVIDE ADEQUATE COMPARATIVE REVIEW PROCEDURES TO INSURE THAT THE DEATH PENALTY IS NOT IMPOSED IN AN ARBITRARY OR DISPROPORTIONATE MANNER.

Petitioner stands on his original argument but does acknowledge the holding in Harris v. Pulley, ___ U.S. ___, 34 Cr.L 3027 (1984). It is Petitioner's feeling that the absence of proportionality review in light of the vagueness of the Illinois Statute and the over-broad grant of prosecutorial discretion, renders the Illinois Statute in violation of the Eighth Amendment. This position is consistent with the holding in Harris v. Pulley, since this Court recognize that a capital statute could be "so lacking in other checks on arbitariness that it would not pass constitutional muster without comparative proportionality review..." 34 Cr.L at 3031

IV. HERNANDO WILLIAMS' RIGHT TO DUE PROCESS AND TO BE PROTECTED FROM CRUEL AND UNUSUAL PUNISHMENT WERE VIOLATED BY THE APPLICATION OF AN AGGRAVATING FACTOR THAT POTENTIALLY RENDERS ALL HOMICIDES CAPITAL OFFENSES.

The Respondent argues that this case is unique. Yet in People v. Brownell, 79 Ill. 2d 508, 404 N.E. 2d 181 (1980) which involved the same crimes and, according to the trier of fact, the

same motives the Illinois Supreme Court held that the application of an over-broad aggravating factor tainted the determination that death was the appropriate sentence.

Due Process and Equal Protection, as applied to the State through the Fourteenth Amendment, do not allow for the creation of the Hernando Williams acception. Nor does the Eighth Amendment to the United States Constitution support such a freakish result.

V. SINCE ONLY THE PROSECUTORS COULD DETERMINE WHETHER OR NOT THE DEATH PENALTY WOULD BE SOUGHT AGAINST HERNANDO WILLIAMS HIS RIGHTS TO DUE PROCESS WERE VIOLATED WHEN THE COURT ACCEPTED HIS PLEA OR GUILTY WITHOUT INFORMING WILLIAMS THAT EVEN A CONVICTION BY PLEA OF GUILTY WOULD SUBJECT HIM TO THE STATE'S ATTORNEY DISCRETIONARY ELECTION TO SEEK THE DEATH PENALTY.

The argument here, contrary to the Respondent's attempt to confuse the issue, is simply that Hernando Williams was never told by the trial court prior to its acceptance of his plea of guilty that he could be sentenced to death, even though he pled guilty. It does not matter what his lawyers knew; it does not even matter what Williams could reasonably expect. All that matters is that Williams was told he could be sentenced to death "if tried and convicted". (H. 10-13) No motion was made as to what sentences could be imposed on a plea of guilty.

A defendant facing the ultimate penalty must be clearly and properly advised by the court of the consequences of his plea before the plea can be said to comport with due process. Where, as here, the record does not establish that the plea was knowingly and intelligently entered, the plea must be set aside. Boykin v. Alabama, 395 U.S. 238 (1969).

CONCLUSION

For the foregoing reasons, Petitioner Hernando Williams, respectfully requests that a Writ of Certiorari be issued to the Supreme Court of Illinois.

Respectfully submitted,

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